United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

76-2152

United States Court of Appeals
For the Second Circuit

B
P/S

ROBERT HOKE,
Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal From The United States District Court For The Southern District Of New York

APPELLANT'S APPENDIX

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DOCKET ENTRIES

June 14, 1976	Filed Notice of Referral, memorandum from Pro Se Clerk to Judge Bonsal, Motion to Vacate Sentence with affidavit of movant and memorandum of law in support.
Sept. 14,1976	Filed Opinion No. 45077.
Oct. 10, 1976	Filed Notice of Appeal

MOTION TO VACATE SENTENCE (Pages 2a to 13a)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
- X

ROBERT HOKE,

Movant

-vs-

UNITED STATES OF AMERICA,

Respondent

- X

MOTION TO VACATE SENTENCE
PURSUANT TO TITLE 28 U.S.C. Sec. 2255

COMES NOW, ROBERT HOKE, who respectfully prays your Honorable Court to enter an Order vacating the Judgment of Sentence and granting him a new trial and/or discharge from his present restraint of liberty on the following grounds:

1. That movant is a citizen of the United States of America.

2. That Movant is now illegally confined in the Federal Penitentiary, Lewisburg, Pennsylvania, P.O. Box 1000.

3. That said illegal confinement is pursuant to a sentence of (Aggregate) of Ten (10) years imprisonment on Counts one (1) of Criminal Indictment No. 1159-72, with a Special Parole of Four (4) years to follow pursuant to Title 21 U.S.C. Section 841 (3) (1) (a) (c) and Section 843 (b).

4. That Count One of said indictment charged Movant with conspiracy to distribute controlled substance, (Heroin).

5. That Movant was tried by Jury together with Six (6) co-defendants before the Honorable Frederick Van Pelt Bryan, from January 16, 1973 to February 23, 1973, and found guilty.

Judge Bryan ultimately reduced the original sentence of 15 years (Count 1) with 4 years special parole to the above described aggregate sentence of 10 years imprisonment with 4 years to follow on special parole.

6. That a direct appeal was filed and denied on May 10, 1974 in a published opinion by the United States Court of Appeals for the Second Circuit (Nos. 73-2178, 73-2179, 73-2181, 73-2182, 73-2183, 73-2184, 73-2185). The Supreme Court of the United States denied Petition for writ of Certiorari on November 11, 1974.

7. That Movant is being held in Federal custody unlawfully because he was deprived of his rights under the Sixth and Fourteenth amendments to the United States Constitution to competent representation by defense Counsel free of conflict of interest.

8. That on October 30, 1972 Attorney Jeffrey M. Hoffman of the Firm of Lenfsky, Sallina, Mass, Berne and Hoffman filed notice of appearance on behalf of Movant and co-defendants Sisca, Abraham, Grant, Holder and Logan and thereupon stated to the Court:

> "By Judge Weinfeld:
>
> Q. Mr. Hoffman, I take it that you have discussed whether or not there is any conflict of interest in your Firm's representation of a number of defendants here?
>
> By Jeffrey M. Hoffman:
>
> A. That's correct your honor. At the present time, having spoken to them, in the posture they are in at the present time, I find no conflict of interest."

9. That also, on October 30, 1972, Attorney Lawrence Greenberg of Legal Aid Society was appointed to represent co-defendant Laverne McBride. But previously, Attorney Murray Addie also of the same Legal Aid Society had been appointed to represent co-defendant Leonard Ellington in this case. Thus, new defense Counsel not of said Legal Aid Society was subsequently substituted for co-defendant because conflict of interest arising from such mutual representation of McBride and Ellington had been detected. Moreover the Legal Aid Society requested that other defense Counsel be appointed for McBride also. And, on November 9, 1972 Attorney Gilbert Epstein was substituted as appointed Counsel for McBride. In accord with the rights of McBride and Ellington. The Walker test of possible conflict of interest and prejudice however remote was applied by said Legal Aid Society and Judge Edward Weinfeld;

See: Walker vs. United States, 422 F.2d 203 (3rd Cir. 1970);
U.S.A. ex rel. Hart vs. Davenport, 478 F.2d 203 (1973).

"Normal competency includes, we think, such adherence to ethical standards with respect to avoidance of conflicting interests as is generally expected from the bar."

10. That, but for the above quoted statement to Judge Weinfeld by Attorney Jeffrey H. Hoffman, your instant Movant's rights to competent representation by defense Counsel free of any possible conflict of interest might also have been safeguarded by the Court - but, also on October 30, 1972, Judge Weinfeld assigned Movant's case to the Honorable Frederick Van Pelt Bryan for hearing of pre-trial motions and trial.

11. That, on November 17, 1972, the Government moved to safe-guard Movant and co-defendants Sisca, Abrahm, Grant, Holder, and Logan's rights to competent representation free of conflict of interest by filing motion that defendants be ordered to retain separate defense counsel not of one and the same Law Firm, notice of motion for order resolving conflict of interest and an affidavit by, Assistant United States Attorney, in support of Government's Motion to resolve conflict of interest.

12. That, on November 22, 1972, Judge Bryan held a hearing on the Government's above described Motion.

(a) At said hearing Judge Bryan failed to explain what conflict of interest was or could be to Movant - while no attorney in any of the Law Firm of Lenefsky, Gallina, Mass, Berne and Hoffman had ever given Movant any explanation of what conflict of interest was and could be.

(b) At said hearing Attorney Gino Gallina, spoke for his entire Law Firm in opposition to the Government's Motion for Order requiring Counsel outside of Mr. Gallina's firm to be retained by Movant and all of Mr. Gallina's statements primarily related to his firm's desire to represent co-defendants Abraham (N.T. of 11-22-72 P. 14, 15, 16, 17, 18, 19, 20, 21 and 22), parts of which were not true statements and the remaining parts of not having anything to do with Movant, Sisca, Grant, Holder or Logan at all.

(c) At said hearing, Judge Bryan ignored the Government's efforts to safe-guard Movant against incompetent representation due to conflict of interest and commenced to question

Movant and each co-defendant on the basis of the above described misleading statements by Attorney Gallina - not allowing the Government's request to have independent legal advice given to Movant by Counsel not associated with the Law Firm of Lenefsky, Gallina, Mass, Berne and Hoffman, as to exactly what conflict of interest is and could be for Movant alone at a Jury Trial.

(d) At said hearing, by not allowing Movant aid of Counsel not of the Law Firm of Lenefsky, Gallina, Mass, Berne and Hoffman, caused and thereby created a conflict of interest and unlawfully found waiver of a known Constitutional Rights where there was no much waiver or intelligent election by Movant and thus, in turn, based the Court's denial of Government's entire Motion on entirely unconstitutional foundations out of no actual findings of fact at all.

(e) At said hearing on November 22, 1972 Judge Bryan, also based the Court's decision to allow Movant to ignorantly suffer the possible and probable consequences of incompetent representation due to conflict of interest of defense Counsel by citing a case authority which was not factually or legally applicable to Movant's particular situation in Judge Bryan's Court (N.T. of 11-22-72, p. 41), to wit:

> "The Court:
>
> As I read United States v. Shinen, (sic) Sheiner there the the conviction was upheld on a waiver practically the same as the one we are conducting this morning; if it could be called a waiver. I would call it an election rather than a waiver, a specific, deliberate election on the part of these defendants. I do not see, Mr. McDonald, that at this point any further inquiries are

necessary. It seems to me quite clear these defendants in view of the extensive discussion of the possibilities this morning and in view . . ."

(f) The entire record of Judge Bryan's hearing on November 22, 1972 clearly shows that there was no "extensive discussion of the possibilities" of prejudice and incompetent representation due to conflict of interest, with Movant or in movant's presence at said hearing or with any attorney who was not associated with Counsel of the Law Firm that was already in conflict with Movant and other co-defendants interests.

13. That the above described hearing on November 22, 1972 as conducted by Judge Frederick Van Pelt Bryan, was no more than a sham and mockery of Justice, and, at said hearing and at all the subsequent pre-trial motion hearings and Jury Trial, Movant suffered the unconstitutional results of incompetent representation by Counsel fue to conflict of interest.

14. That, on November 22, 1972 Judge Bryan made no adequate or impartial inquiry at all to either ascertain that no conflicts of interest existed or would be likely to result at further pre-trial motions and trial, actually conceded that, conflict of interest would result if said Law Firm continued to jointly represent Sisca, Abraham, Grant, Movant, Holder and Logan at the same trial on the same indictment and failed to establish (as to Movant) any intelligent waiver of a known Constitutional Right.

See: United States v. Williams, 429 F.2d 158, 181 (8th Cir. 1970);
Government of Virgin Islands vs. Johns, 447 F.2d 69, 74 (3rd Cir. 1971);
Commonwealth ex rel. Whitling vs. Rus[illegible], 406 Pa. 45, 176 A.2d 641.

15. That the Government's case against each of the six co-defendants jointly represented by one Law Firm governed and controlled by one Attorney in Gino Gallina disclosed accusation of a "chain" conspiracy as commonly charged in narcotics cases and Judge Bryan's subsequent denial of defense motion for severance on co-defendant Sisca's behalf alone caused commonly shared Law Firm attorneys to deprive Movant of his rights to take the witness stand and testify in his own defense at trial by Jury - because of the same jointly shared Law Firm's inability, to examine Movant or any co-defendant at the same trial on the same indictment.

See: United States v. Pino, 452 F.2d 507 (5th Cir. 1971).

(a) At the expense of the rights of Movant, Attorney Gino Gallina apparently instructed all other Attorneys of the same Law Firm (Lenefsky, Gallina, Mass, Berne and Hoffman) to neglect to file timely pre-trial motions for severance and separate trial on Movant's behalf - while said attorney did file motion for severance on behalf of co-defendant Sisca alone.

(b) At the expense of the Rights of Movant, attorney Gino Gallina apparently instructed all other attorneys of the same Firm (Lenefsky, Gallina, Mass, Berne and Hoffman) to neglect to file timely pre-trial motion for suppression of Wire Tap Evidence on grounds of lack of minimization on Movants' behalf even when instructed to do so by the Court - while said attorney (Mr. Gallina) and all other attorneys of said firm knew that wire tap evidence was the only evidence the government alleged

to have Against Movant (see hearing, of severance motion of December 27, 1972) and while the entire firm of Lenefsky, Gallina, Mass, Berne and Hoffman was aware that it was then perfecting a defense for co-defendant Alphonse Sisca alone which would include presentation of proofs that Sisca's voice was not on any tape evidence and that Sisca alone would present an alibi defense. Thus, the existence and results of conflict of interest was apparent prior to trial, during trial and throughout direct appeal into the Supreme Court of the United States which denied Certiorari.

(c) The entire record shows that the Firm of Lenefsky, Gallina, Mass, Berne and Hoffman, were judicially given from December 27, 1972 until January 18, 1973 to file all pre-trial motions on Movant's behalf for suppression for Wire Tap Evidence for lack of minimization, as well as for lack of following directives of State and Federal Law by police, for not following directives in the warrants as to some of the tapes by police and for lack of any legal authorization at all - as to tapes taken by police on dates prior to dates mentioned in the warrants obtained. Counsel's failure to timely raise such available pre-trial defenses (together) on Movants' behalf shows incompetent representation due to conflict of interest.

See: United States v. Ash, 413 US 300, 93 S.Ct. 2568, 37 L. Ed. 2d. 619 (1973); Quoting: United States v. Bennett, 409 F.2d. 988 (2nd Cir. 1969).

(d) A timely motion on lack of minimization of wire tap evidence should have been filed together with all other motions that were timely filed - because the facts in favor of one would have shed favorable light on the other - when it can

now be said that the doctrine of minimization and defense remedies to violations of same existed in the legal heads of Counsel long before the trial date of this case.

16. That the record clearly indicates that controlling defense Counsel Gino Gallina filed a motion for severance (separate trial) for co-defendant Sisca alone - while holding his other associate Law Firm attorneys Hoffman and Pollock from filing motions for severance on behalf of Movant and other co-defendants, because Mr. Gallina believed the Court would grant his Motion for Sisca alone. Therefore, Movant and other co-defendants were prejudiced from the inception of Mr. Gallina's action and by said inaction by Mr. Hoffman and Mr. Pollock where Counsel was thus barred from allowing co-defendant Abrahams to testify at the trial in his own defense and in denial of Government trial accusation that he had informed on himself and others at the time of his arrest.

(a) By the prejudicial inaction of Mr. Gallina's entire Law Firm prior to trial said Firm was barred from leaving co-defendant Abrahams open to cross-examination by the Government - on the alleged post-arrest interrogations by Agent Harris, Albert and other agents (M.T. 286, 287, 288, 289, 290, 292, 293, 294, 324 of Vols. 1 and 2) of co-defendant Abrahams.

(b) Attorney Hoffman merely cried out at the pain of restraint that Mr. Gallina had shackled all co-counsel with by belatedly requesting the Court to subpoena all Government agents that agent Harris had testified were present furing the post-arrest interrogations of co-defendant Abrahams (N.Y. 295

Vol. 1), and the Court told Mr. Hoffman to go ahead and subpoena. Mr. Hoffman answered "Thank You", to the Court and thereafter did not in any manner give or move to issue the requested subpoenas at any time. This inaction is just one of the many recorded proofs that Movant's jury trial was made a sham and a mockery of Justice by incompetent representation by defense Counsel due to conflict of interest.

(c) The Government agent allegations of multiple post-arrest interrogations, meetings (after release on bail) and attempted meetings with co-defendant Abrahams (N.T. 293, 294 etc. Vol. 1) became so prejudicial to all defendants on trial before the same Jury that another co-defendant's Counsel not of or related to the Law Firm of Lenefsky, Gallina, Mass, Berne and Hoffman - a Mr. Epstein made a blanket trial Motion on behalf of all defendants against the joinder of said defendants for such trial - asking that such prejudicial proceedings be judicially stopped - citing the case of United States v. Mele, 462 F.2d 918 (June 15, 1972) as authority for grant of a mistrial, which the Court denied.

(d) The record further shows that attorneys Gallina, Hoffman and Pollock did not join Mr. Epstein in the above described most relevant motion for mistrial on good cited authority of Mele.

See: also United States v. Rispo, 460 F.2d 965, 970 (3rd Cir. 1972).

17. That the representation of multiple defendants, as to successive stages in an alleged Narcotics Distribution Chain, without any intelligent knowing and free of conflict waivers, represents a conflict of interests as a matter of Law.

(a) The entire proceeding by Judge Frederick Van Pelt Bryan on November 22, 1972 was totally inadequate and unlawful where attorneys Jeffrey Hoffman, John Pollock et al., were absent therefrom, did not and could not speak therein for themselves or for Movant and co-defendants other than co-defendant Alphonse Sisca. At all pre-trial Motions hearings and at trial and even at said proceeding of November 22, 1972 it was apparent that Attorney Gino Gallina and his entire Law Firm could not competently or effectively coordinate the defenses and possible defenses of six (6) different defendants - thus, on said date, the Court did not hear Mr. Gallina alone and decide the issue of possible conflict of interest in accord with Law and the Constitutional Rights of Movant or any other co-defendant in this case.

(b) Courts have held and this Honorable Court should hold that upon a showing of possible conflict of interest and/or prejudice however remote, joint representation will be reargued as Constitutionally defective.

See: United States ex rel. Hart v. Davenport, 478 F.2d 203 (1973);
United States ex rel. Small v. Rundle, Warden, 442 F.2d. 110 (2nd Cir. 1957);
Glasser v. United States, 315 U.S. 60 (1942) and
A.B.A. Standards Function pp. 213, in relevant part:

"The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representations".

(c) In the years 1942 the Glasser Court (315 U.S. 50), had long before advised and mandated to Judge Bryan in this case.

> ". . . irrespective of any conflict of interest that additional burden of representing another party may conceivably impair counsel's effectiveness. The right to have the assistance of Counsel is too fundamental and too absolute to allow Courts to indulge in nice calculations as to the amount of prejudice arising from its denial".

18. That Section 2255 of Title 28 U.S.C. requires that a District Court "promptly" issue show Cause and/or conduct an evidentiary hearing and/or make findings of fact and conclusions of Law, unless the records of the case conclusively show the allegations presented are untrue. The record and all Law as cited herein fully support the grant of this Motion to Vacate Sentence.

Wherefore:

On the basis of the separate and cumulative facts as herein above set forth, Movant prays that his Sentence be Vacated and that he be granted a new trial and/or be discharged (released) from illegal restraint of his liberty.

Respectfully submitted,

s/Robert Hoke

ROBERT HOKE - MOVANT

Sworn to

December 10th, 1975

AFFIDAVIT OF ROBERT HOKE IN SUPPORT (Pages 14a to 16a)

- - - - - - - - X

SAME TITLE

- - - - - - - - X

STATE OF NEW YORK)
SS:
COUNTY OF MANHATTAN)

I. ROBERT HOKE, hereby swear to the following events and that they did happen (as described herein) at and in a pre-hearing meeting with Attorney Gino Gallina at the office of the Law Firm of Lenefsky, Gallina, Mass, Berne and Hoffman - located in New York City, New York - immediately prior to my appearance before Honorable Frederick Van Pelt Bryan of the United States District Court for the Southern District of New York on November 22, 1972, to wit:

1. Prior to November 22, 1972, I was notified by Attorney Gino Gallina that a pre-hearing conference would be held at the law office of Lenefsky, Gallina, Mass, Berne and Hoffman.

2. On November 22, 1972, I did personally appear at said law office for such conference - together with co-defendants Walter Grant, Errol Holder, Willie Abraham, et al.

3. On November 22, 1972, Attorney Gino Gallina was a member of the law firm of Lenefsky, Gallina, Mass, Berne and Hoffman located in New York City, New York.

4. On November 22, 1972, only the above named were present at said pre-hearing conference with me in Gino Gallina's

office. Co-defendant Alphonse Sisca was not present at said conference.

5. On November 22, 1972, associate counsel Pollack, Hoffman, et al., were not present at said pre-hearing conference and same was held by Attorney Gino Gallina alone.

6. Attorney Gino Gallina was representing co-defendant Alphonse Sisca; not me, nor any other co-defendant than Mr. Sisca.

7. At no time prior to, on, or after November 22, 1972, was I ever afforded an opportunity to read and/or personally examine any written motion that had been filed by the Government. At no time did Attorney Gino Gallina read any written motion to me or to any other co-defendant in my presence.

8. At no time did Attorney Gino Gallina explain to me what conflict of interest was or how ineffective and/or incompetent defense representation could result therefrom.

9. Prior to, on, and after November 22, 1972, I had no personal knowledge whatsoever of what conflict of interest was, and had no personal knowledge of what ineffective and/or incompetent representation by defense counsel was, and had no knowledge of the possible harm that same could bring against me in a criminal case.

10. On November 22, 1972, Attorney Gino Gallina (at his office) advised me that Government Prosecuting Attorneys had asked Judge Frederick Van Pelt Bryan to bar the Law Firm of Lenefsky, Gallina, Mass, Berne and Hoffman from representing five (5) defendants in my case. The reason Attorney Gino Gallina gave to me and co-defendants Abraham, Grant, Holder, Logan, et al

(in the absence of Sisca on November 22, 1972) for said Government request, was that the Government Prosecution was plotting against me and my co-defendants who were present at said conference by reason of the fact (as Mr. Gallina stated it) that the Government would have an unfair advantage over and thereby easily convict me and all other co-defendants if each co-defendant and I retained defense attorneys not of the Law Firm of Lenefsky, Gallina, Mass, Berne and Hoffman.

11. On November 22, 1972, at said pre-hearing conference, the above described advise by Attorney Gallina instilled fear in me that I would be easily convicted and sentenced to lengthy imprisonment, lose all appeals, etc., if I accepted any offer or retainer of defense counsel from any attorney other than of the Law Firm of Lenefsky, Gallina, Mass, Berne and Hoffman.

12. Therefore, I (prior to or on November 22, 1972) did not personally understand the legal or constitutional significance of the facts as set forth herein and only gained such awareness upon retaining my present attorney.

Personally appeared before me this 18th day of December, 1975 (affiant), who being duly sworn, stated that the foregoing facts are true and correct to the best of his knowledge, information and belief.

This, the 18th day of Dec., 1975

s/Robert Hoke
ROBERT HOKE

MEMORANDUM OF LAW IN SUPPORT OF MOTION (Pages 17a to 27a)

- - - - - - - - X

SAME TITLE

- - - - - - - - X

STATEMENT OF FACTS

A number of defendants were indicted for various drug offenses. The Law Firm of Lenefsky, Gallina, Hass, Berne and Hoffman filed notices of appearance on behalf of six co-defendants. Prior to trial, the Government informed the trial judge that the evidence would disclose a "chain" conspiracy, common in narcotics cases, and that a possible conflict of interest could arise by having one law firm represent six co-defendants.

The Government filed a motion to resolve this apparent conflict of interest, and the trial judge conducted a pre-trial hearing on the matter. At the hearing, Attorney Gallina urged the court to allow his firm to remain as counsel for all co-defendants. In open court, the trial judge asked the defendants individually whether they understood that a possible conflict of interest might arise by having the same firm represent six co-defendants. Each defendant assured the trial judge that despite any possible conflict, he wished to be represented by the Gallina firm. The judge did not specify how a conflict might arise. Nor did he conduct in camera proceedings or appoint different counsel with whom the defendants could discuss any possible conflict. The court allowed the Gallina firm to remain as counsel for all six co-defendants.

At trial, certain wiretaps were introduced which tended to incriminate five of the co-defendants, but which tended to exonerate the sixth co-defendant, who was the alleged "Kingpin" in the conspiracy.

At no time before trial did attorneys for any of six co-defendants move to suppress these wiretaps. The five co-defendants, who were implicated by the contents of the wiretaps, were convicted of various narcotics offenses. The sixth co-defendant, Sisca, who did not appear on any of the wiretaps, was acquitted. Robert Hoke, one of the five who was convicted, was sentenced to prison for violations of 21 U.S.C.A. Sec. 841. Following the trial, counsel for the co-defendants moved to suppress the wiretap evidence. The court would not entertain these motions on the ground that they should have been filed prior to trial.

The defendant Hoke now moves to vacate sentence pursuant to 22 U.S.C.A. Sec. 2255 on the basis that his Sixth Amendment rights were abridged.

ARGUMENT

THE DEFENDANT HOKE WAS DENIED HIS SIXTH AMENDMENT RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL

The question of when a convicted defendant has been denied his Sixth Amendment rights, resulting from a conflict of interest of trial counsel, has been the subject of much recent treatment in the Second Circuit Court of Appeals. The starting point for a discussion of this issue is in the case of Morgan v. United States, 396 F.2d. 110 (2nd Cir. 1968). In Morgan, the defendants were convicted of violating the Mann Act. Prior

to trial, counsel for the defendant, Morgan, withdrew from the case, and the trial judge appointed the attorney for Stein, Morgan's co-defendant, to represent Morgan. A conflict arose between the positions of Stein and Morgan, and Stein was not cross-examined on Morgan's behalf.

Morgan asked that his sentence be vacated, and filed a Section 2255 proceeding, alleging denial of Sixth Amendment rights. In remanding the proceedings, the court stated:

> "Despite what the appearance may be before trial, the possibility of a conflict of interest between two defendants is almost always present to some degree even if it be only in such a minor matter as the manner in which their defense is presented." 394 F. 2d at 114

Accordingly, the court suggested that, where a potential conflict of interest might arise from a joint representation situation, the trial court should determine, through "careful inquiry", whether prejudice will result from the joint representations. The court felt that the trial judge was in the position to make inquiry, "both public and private", as may be necessary to determine if a conflict would arise.

Subsequently, in United States vs. Lovane, 420 F.2d, 769 (2d Cir. 1970, cert. denied, 397 U.S. 1071 (1970, the court further specified what would be required for a reversal of conviction on Sixth Amendment grounds resulting from a conflict of interest. The court set forth the Second Circuit rule:

> "The rule in this Circuit is that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel." (420 F.2d at 773.)

See: United States of America v. Badalamente, 507 F.2d 12 (2d Cir. 1974), cert. denied, 95 S. Ct. 1565 (1975).

Thus, the rule in the Second Circuit is that some specific showing of prejudice must be shown to overturn a conviction on the conflict of interest ground. The Lavane rule has remained viable in the Second Circuit, and most of the recent litigation on the conflict issue has been concerned with the sufficiency of the pre-trial inquiry by the trial judge in relation to the Lovano standard.

Here, the defendant, Hoke, has suffered a specific prejudice through the failure of his counsel to move that incriminating wiretap evidence be suppressed. The question then arises as to whether the pre-trial inquiry was effective so as to alert Hoke of the possibility of this prejudice, thereby casting serious doubt on his post-trial claim.

Even before the Lovano standard of "specific prejudice" was enunciated, the court had made inquiry into the issue of the sufficiency of the pre-trial hearing. In United States v. Sheiner, 410 F.2d 337 (2d Cir. 1969), cert. denied, 396 U.S. 825 (1969), cert. denied sub nom. U.S. v. Piacentile, 396 U.S. 859 (1969), rehearing denied, 412 U.S. 944 (1973), the defendants were convicted of mail fraud and conspiracy offenses relating to the fraudulent sale of altered pennies. On the second day of trial, the trial judge informed the two defendants who were represented by the same counsel that the government's evidence tended to show that the Defendant Sheiner was the "outlet" for coins provided by the defendant, Piacentile. The court noted that this might

present a conflict and asked the defendants to consider whether they wished to continue being represented by sane counsel. On the next day, after the Defendant Sheirner had conferred with another attorney, he informed the trial judge that he did not wish to change his attorney.

After Sheiner was conficted, he appealed on Sixth Amendment grounds. The court, citing Glasser v. United States, 315 U.S. 60 (1942), noted the importance of representation free from conflicting interests. As to the Defendant Sheiner, however, the Court remarked:

> "We think that the evidence in this case shows that Sheiner was clearly informed of the possibility of prejudice from sharing Piacentile's counsel but he freely made a considered choice to continue Mr. Siegal's joint representation. The Court was scrupulous in alerting Sheiner and his counsel to the danger of conflicting interests that Sheiner had discussed the question with counsel, considered it and decided to proceed with Siegal." 410 F. 2d at 342

The record in the present case reveals that the trial judge, relying on Sheiner, insisted that the pre-trial hearing was sufficient to dispose of the conflict of interest issue. Upon closer examination, however, it is clear that Sheiner is distinguishable on at least two bases. First, unlike the defendant here, Sheiner was advised by the trial judge as to how his position would conflict with that of his co-defendant. Secondly, Sheiner had the opportunity to consult with outside counsel on the conflict matter.

The Court had the opportunity to expand on the sufficiency of hearing issue in United States v. Alberti, 470 F. 2d 878 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973). In re-

jecting the defendant's Sixth Amendment claim, the Court commented upon the proper course for the trial judge to take when a potential conflict of interest becomes apparent:

> "In such circumstances, the district judge should conduct a hearing to determine whether there exists a conflict of interest with regard to defendant's counsel such that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment.
>
> In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views. Such a procedure by the district court would reduce the possibility that this court would feel obliged to reverse a conviction and order a new trial because defendant's counsel was inhibited by a conflict of interest."
> (emphasis added) 470 F.2d at 881-82

The holding in Alberti seems to venture further that Sheiner on the issue of the importance of the defendant's understanding of the nature of the conflict. A procedure such as that employed in the present case, which does not purport to instruct the defendants as to the manner in which the conflict might arise, is clearly insufficient in light of Alberti. The trial judge made no effort to determine if the defendants were fully advised of the facts underlying the conflict.

In United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973), the court adopted a significant new rule in Sixth Amendment conflict of interest cases. In DeBerry, two defendants, convicted of drug offenses, who were represented by the same attorney appealed on the Sixth Amendment conflict ground. The court pointed out that, although counsel for the co-defendants assured the trial judge that he had explained the conflict issue to the defendants, this was insufficient inquiry. The Court, citing

United States v. Foster, 469 F.2d. 1 (1st Cir. 1972), adopted the rule that, where the inquiry of the trial judge is insufficient, the burden on the question of prejudice is shifted to the Government. 487 F.2d at 453, n. 6

While the trial court in DeBerry apparently did not question the defendants at all, relying instead on the counsel's assurance, the fact that the trial judge did question the defendants here should not remove this case from the DeBerry rule. The effect of an inadequate inquiry is the same as that resulting from the non inquiry at all. Hence, the teaching of DeBerry is that the Government here has the burden of proof of showing that no prejudice resulted to the Defendant Hoke from the joint representation by the Gallina firm.

The progression of Sixth Amendment conflict cases in the Second Circuit, which are relevant here, ends with United States v. Vowteras, 500 F.2d. 1210 (2nd Cir. 1974, cert. denied, 419 U.S. 1069 (1975). In the Vowteras case, the court clarified its position as to the rule of the pre-trial hearing. It will be recalled that in Alperti, supra, the court indicated that the pre-trial hearing would serve to reduce the possibility of the convictions being reversed on appeal. The mere fact that a pre-trial is held on the conflict issue will not necessarily be conclusive on the Sixth Amendment issue. Similarly, in Vowteras, the court stated that, since the defendants were fully advised of the underlying facts of the potential conflict, they could not, on appeal, repudiate their choice of counsel, absent specific showing of

prejudice. The clear import of Alberti and Vowteras is that, even where the defendants are fully advised, a specific showing of prejudice can defeat the conviction. It seems, then, that the role of the pre-trial hearing is simply to mitigate the possibility of resulting prejudice. If prejudice is shown, a conviction may be reversed, not-withstanding a sufficient pre-trial hearing.

An overview of the Second Circuit cases result in the formulation of certain rules which pertain to Sixth Amendment conflict cases. First, the defendant must point to a specific prejudicial occurrence in order to prevail on appeal. A sufficient pre-trial hearing during which the defendant is fully advised of the facts underlying the potential conflict will bear heavily against a bona fide showing of prejudice. If a pre-trial hearing which amounts only to an insufficient inquiry is afforded, the burden of showing no prejudice will be on the Government.

Turning to the present case, then, the first hurdle which confronts the defendant is the point to a specific instance of prejudices resulting from the joint representation of the Gallina firm. Such a showing of prejudice is apparent from the record. The Gallina firm neglected to file motions to suppress the wiretaps until after the trial had concluded. The circumstances of this case lead to one other conclusion, but the failure to make these motions was for the sole reason that the wiretap evidence did not implicate Sisca, the alleged leader of the conspiracy. Thus, this prejudice was the direct result of

joint representation which abridged Sixth Amendment rights.

The case of United States ex rel. Bart v. Davenport, 478 F.2d 203 (3d Cir. 1973), tends to support the defendant's allegation of prejudice resulting from the failure to file pre-trial motions. In Hart, six co-defendants who were charged with various gambling offenses were represented by the same attorney at trial. The evidence showed that the appellant Hart was employed as a bartender in an establishment owned by Mr. and Mrs. Batersby. A search of the premises resulted in the seizing of evidence which tended to implicate Hart. Although the affidavit underlying the warrant which authorized the search was characterized by the Third Circuit Court as "palpably insufficient", counsel for the co-defendants made no pre-trial motions for suppression of the evidence.

After Hart was convicted, he appealed on the basis of ineffective assistance of counsel. Upholding his claim, the court noted that, had an effort been made to separate Hart from the seized evidence, another defendant would have been further implicated:

> "Here, again, the predicament of counsel becomes clear, for any effort to negate Hart's connection with Exhibits S-9 and S-10 would have the inevitable tendency to focus attention on batterby's role as a proprietor of a gambling enterprise as well as a bar and grill. 478 F.2d at 208

The conflict between Hoke and Sisca in the present case seems, if anything, more aggravated than the conflict in Hart. Here, had a successful suppression motion been made, Sisca's case would have been weakened, in that the jury would not have been aware of the conspicuous absence of his voice in the wiretap

evidence. This crucial evidence, if suppressed, would have, in effect, weakened Sisca's position in the eyes of the jury and would have strengthened immeasurably the stance of Hoke and the other co-defendants. Accordingly, effective representation by the Gallina firm of both Sisca and the other defendants was not possible, and Hoke's Sixth Amendment rights were abridged. The failure to ask that the wiretap evidence be suppressed is a specific showing of prejudice as required by Lovana.

The remaining question is whether the pretrial inquiry was sufficient to afford the defendant's full understanding of the potential conflict, that they may not now object to the joint representation. As heretofore noted, the trial judge did not inquire as to whether the defendants were aware of the facts underlying the potential conflict. Thus, a breach occurred in the protection afforded by Alberti, and the inquiry became insufficient as a matter of law. Although in camera proceedings were suggested at the pre-trial hearing, the judge did not feel that such proceedings were necessary. Compare: United States v. Vowteras, supra. Finally, the judge did not see to it that the defendants had guidance from independent counsel on the conflict issue. Compare: United States v. Sheiner, supra; United States v. Liddy, 348 F. Supp. 198 (D.D.C. 1972).

CONCLUSION

It is clear, that the defendant Hoke has suffered a specific prejudice resulting from the joint representation. The burden lies on the Government to show otherwise. The pre-

trial inquiry which attempted to alert Hoke to the potential conflict of interest was insufficient to accomplish its purpose. Mr. Hoke is entitled to have his sentence vacated and either to be released from custody, or to be granted a new trial.

Respectfully submitted,

s/ Robert Hoke
ROBERT HOKE
Movant

OPINION (Page 28a to 35a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

ROBERT HOKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

76 Civ. 2597

- X

BONSAL, D.J.

On October 16, 1972, Indictment 72 Cr. 1159 was filed in the Southern District of New York charging petitioners Willie Abraham, Erroll Holder, Walter Grant, Robert Hoke and fourteen others with conspiracy to violate the federal narcotics laws, with use of the telephone to further such violations, and charging Willie Abraham with managing a continuing narcotics enterprise in violation of Title 21, United States Code, Sections 846, 849(b) and 848, respectively. Following a six-week jury trial before Judge Bryan, and guilty verdicts as to all petitioners on the conspiracy count, as to all petitioners except Hoke on the number the telephone to further the conspiracy, and as to Abraham on engaging in a continuing criminal enterprise, the petitioners were sentenced by Judge Bryan on June 26, 1973. On May 10, 1974, the Court of Appeals affirmed the judgment of conviction on all counts and a petition for writ of certiorari to the United States Supreme Court was thereafter denied. United States v. Sisca, 503 F. 2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974).

Petitioners now move pursuant to 28 U.S.C. Section 2255 for an order vacating the sentences and granting a new trial on the grounds that they were denied effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution.

At the trial, petitioners and two other defendants, Alphonse Sisca and Margaret Logan, were represented jointly by the law firm of Lenefsky, Gallina, Mass, Berne and Hoffman (hereinafter referred to as the "Gallina" firm). Specifically, Abraham, Logan, and Grant were represented by Mr. Jeffrey Hoffman, Holder by Mr. John Pollok, Hoke by Mr. Robert Kiernan, and Sisca by Mr. Gino Gallina.[1]

Petitioners contend that this multiple representation created a conflict of interest which prejudiced them because counsel failed to file a pretrial minimization motion to suppress wiretap evidence, allegedly for the reason that the evidence was beneficial to defendant Alphonse Sisca. Petitioners contend that they were not made aware of what a conflict of interest was, how it might arise in the case, or how it could lead to a bad defense. Petitioners also contend that they should have been given the opportunity to confer or consult with outside counsel prior to the conflict of interest hearing before Judge Bryan on November 22, 1972.

By Notice of Hearing dated April 15, 1976, the Court ordered an evidentiary hearing pursuant to 28 U.S.C. Sec. 2255

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1. On appeal, Abraham, Grant and Logan *** Henry J. Boitel, holder by Mr. John L. Pollok, formerly of the Gallina firm; Hoke by Mr. Robert Kiernan; and Sisca by Mr. Gino Gallina.

on the conflict of interest issue raised by petitioners Abraham and Holder. Following the hearing on May 25, 1976, petitioners Hoke and Grant, on June 14, 1976, filed similar motions to vacate their sentences. Since the Court finds the evidence produced at the May 25, 1976 hearing is applicable to the issues raised in the Hoke and Grant motions, a new evidentiary hearing will not be ordered and all four motions will be considered together.

Pre-Trial Hearing

On November 22, 1972, before the trial, Judge Bryan conducted a hearing on the Government's motion for an order resolving possible conflicts of interest arising from the multiple representation of the defendants by the Gallina law firm. During this hearing, at which petitioners were represented by Mr. Gino Gallina, a member of the Gallina firm, the Court apprised each defendant "... of the possibility of a situation developing during the trial in which the best protection of your interests may be different from the protection of the interests of one or more of your co-defendants who is represented by the same counsel." United States v. Sisca, et al., 72 Cr. 1159 (Transcript of hearing conducted November 22, 1972 at 25) (hereinafter, Tr. 11/22/72).

Following the specific inquiries by the Court as to each defendant's understanding of the possible conflicts of interest, and after apprising the defendants of their right to have counsel of their own choosing, including separate and individual counsel, the Court concluded that each defendant had

made a deliberate election of the Gallina firm in conformity with the holding of United States v. Sheiner, 410 F.2d 337 (2d Cir.), cert. denied, 396 U.S. 825 (1969). (Tr. 11/22/72 at 41).

From the transcribed record of the November 22, 1972 hearing, it appears that petitioners were informed on the conflict of interest arising from the multiple representation and that they each made a considered choice to continue with the Gallina firm as their counsel. Moreover, it appears that the trial court took steps to insure that petitioners were apprised of their right to be represented by individual counsel (Tr. 11/22/72 at 24-31) and that the Court found each petitioner had voluntarily waived his right to be represented by individual counsel.

Indeed, the trial court cautioned the petitioner about retaining counsel from the same firm by stating:

> "I am going to say this to each of the defendants: I want you to understand that by taking the position that you do this morning, that you want to continue with the Gallina firm representing all six of you, despite what we talked about here earlier, that you are doing this for good. You are committing yourselves now and you are never going to be able to raise this question on appeal or any other time if something develops during the trial that is unfavorable to you. You have elected to keep the Gallina firm; do you understand that?" (Tr. 11/22/72 at 35-36)

The trial court then found,

> "... that what I am going to do is to resolve the question before me this morning upon the basis that each of these defendants has freely exercised his or her choice of counsel and with full realization of the possibilities or, indeed, the probabilities that some conflict of interest may develop, they

have elected to continue to have Mr. Gallina's firm represent them. The only thing I can do with such a free election is to recognize their right to make such a free choice and I will permit them to do so." (Tr. 11/22/72 at 43).

The trial court, throughout this pre-trial hearing, was following this Circuit's ruling in United States v. Sheiner supra, and, as such, the Court reasoned that petitioners' choice of counsel should not be disturbed. See United States v. Armone, 363 F.2d 385 405-06 (2d Cir.), cert. denied, 385 U.S. 957 (1966); United States ex rel. Davis v. McMann, 386 F.2d 611 (2d Cir. 1967), cert. denied, 390 U.S. 958 (1968).

Claims of Prejudice

As to petitioners' claim of prejudice, the trial court held a post-conviction evidentiary hearing on several motions made during the trial to suppress wiretap evidence on the grounds the Government had failed to minimize the interception of communications not subject to interception. In a published opinion, United States v. Sisca, 361 F. Supp. 735 (S.D.N.Y. 1973), Judge Bryan found that the defendants had failed to comply with the time requirements of the statute relating to suppression motions of wiretap evidence (18 U.S.C. Sec. 2518(10)(a)) and had waived any right to make such motions after trial had commenced since there was ample time for such motions during the pre-trial discovery.

Judge Bryan's findings were later affirmed by the Court of Appeals in United States v. Sisca, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974), "... on the ground that appellants waived their right to challenge the admissibility

of the wiretap evidence by deliberately refusing to raise the failure to minimize claim in a pretrial motion." Id. at 1347.

The Court of Appeals also held that:

> "... appellants, by ignoring the district court's explicit directive to make their minimization motions before trial, elected to pursue a trial strategy of intentional relinquishment of a known right and the deliberate by-pass of the orderly and timely suppression procedure provided by Section 2518(10)(a). In doing so, they waived their right thereafter to challenge the admissibility of the wiretap evidence. Cf. Kaufman v. United States, 394 U.S. 217, 227 n.8 (1970); Henry v. Mississippi, 379 U.S. 443, 450-51 (1965); Fay v. Noia, 372 U.S. 391, 438-39 (1963)." Id. at 1349.

The May 25, 1976 Hearing

At the evidentiary hearing on May 25, 1976, Mr. Gino Gallina testified that he had several conferences with the petitioners prior to trial, that the subject of conflict of interest and joint representation was discussed more than once, and that he met with the petitioners on the morning of November 22, 1972, prior to the hearing before Judge Bryan, and that he discussed conflict of interest and joint representation. (Transcript of hearing conducted May 25, 1976 * * * Mr. Gallina also testified that he represented Mr. Alphonse Sisca at trial (Tr. 5/25/76 at 112), and that he represented all the petitioners at the hearing on November 22, 1972 because he was the one attorney in the firm who was free that

morning. (Tr. 5/25/76 at 133-34).

Petitioners Abraham and Holder testified that they, along with petitioners Grant and Hoke, attended a meeting with Mr. Gallina on the morning of November 22, 1972 at which time Mr. Gallina informed them of a hearing to be held later that morning on the Government's motion for a hearing to resolve possible conflict of interest questions. (Tr. 5/25/76 at 26-28; 48-49).[2]

Under the Sixth Amendment's guarantee of the right to assistance of counsel in criminal cases, petitioners are entitled to representation free from conflicting interests. Glaser v. United States, 315 U.S. 60 (1942). Indeed, where the trial court becomes aware of a potential conflict of interest, it should:

> ". . . conduct a hearing to determine whether there exists a conflict of interest with regard to defendant's counsel such that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment. In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views." United States v. Alberti, 470 F.2d 878, 881-82 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973).

This is precisely what Judge Bryan did on November 22, 1972.

2. Mr. John L. Pollok testified at the May 25, 1976 hearing that he discussed the subject of joint representation and conflict of interest with petitioners Holder, Grant and Hoke, among others, approximately two or three days prior to trial and that all three petitioners indicated that they understood about the conflict of interest but still wanted to continue with the Gallina firm. (Tr. 5/25/76 at 77-78, 80).

On the other hand, the Sixth Amendment also gives protection to a defendant's selection of retained counsel, United States v. Armedo-Sarmiento, 524 F.2d 591-92 (2d Cir. 1975); United States v. Wisniewski, 478 F.2d 274 (2d Cir. 1973); United States v. Sheiner, 410 F.2d 337 (2d Cir.), cert. denied, 396 U.S. 825 (1969); United States ex rel. Davis v. McMann, 386 F.2d 911 (2d Cir. 1967), cert. denied, 390 U.S. 958 (1968), and, indeed, "... the right to manage one's own defense is at the heart of the Sixth Amendment's guarantees." United States v. Armedo-Sarmiento, supra at 592, citing Faretta v. California, 422 U.S. 806 (1975).

Here, the trial court, at the request of the Government, conducted a hearing within the guidelines of United States v. Sheiner, supra, and United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973) to determine whether defendants understood the possibility, and, in fact, the probability of a conflict of interest arising out of joint representation, and the right of each defendant to be represented by individual counsel of his own choosing. Only after the trial court had questioned each defendant individually at some length did the court conclude that the defendants had elected to continue with the Gallina firm as retained counsel. (Tr. 11/22/72 at 43).

On the record produced at the November 22, 1972 conflict of interest hearing and at the evidentiary hearing on May 25, 1976, the Court finds that petitioners elected to continue with members of the Gallina firm as their counsel at trial

and that in doing so they were knowingly exercising a right guaranteed to them by the Sixth Amendment. See United States ex rel. Davis v. McMann, supra; United States v. Armone, 363 F.2d 385, 405-06 (2d Cir.), cert. denied, 385 U.S. 957 (1966). It appears that the trial court carefully questioned each petitioner as to his desire to continue with the Gallina firm after pointing out the possibilities of conflicts of interest and that, under the circumstances, the trial court protected petitioners' constitutional rights to effective assistance of counsel.

As to the alleged claims of prejudice arising from the failure to file a timely minimization motion, the Court finds that this issue was fully explored on appeal, United States v. Sisca, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974), that the decision not to file a pre-trial minimization motion was a deliberate trial tactic, and that further discussion of this issue is not warranted here.

Accordingly, the Court denies petitioner's motions to vacate their sentences and/or grant a new trial.

It is so ordered.

Dated: New York, N.Y.
September 15, 1976

Dudley B. Bonsal
U.S.D.J.

NOTICE OF APPEAL

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-- X

ROBERT HOKE,

Petitioner,

-against-

UNITED STATES OF AMERICA

Respondent.

- X

NOTICE IS HEREBY given that Robert Hoke, petitioner appeals to the United States Court of Appeals for the Second Circuit from the Order-Memorandum #45077 entered September 14, 1976 by Hon. Dudley B. Bonsal.

Dated New York, New York
October 12, 1976

ALAN M. PALMER
1707 N. Street N.W.
Washington, D.C. 20036

s/Morton Katz
MORTON KATZ
15 Park Row
New York, New York

Attorney for defendant-Appellant
Robert Hoke solely for the
purpose of serving and filing
the within notice of appeal.

TO: Clerk of the court of Appeals
Second Circuit
Foley Square
New York, New York

W. Cullen McDonald, AUSA
1 St. Andrews Plaza
New York, New York

CHANCE

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 20 day of Dec. ,19 76 at No. 1 St. Andrews Pl., NYC

deponent servied the within appendix upon U.S. Atty., So. Dist. of NY

the Appellee herein, by delivering true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
20 day of Dec. 1976.

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978